No. 4710

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1931.

AMERICAN CAR AND FOUNDRY COMPANY, a corporation,
(Libellant) Appellant,

vs.

H. A. BRASSERT,
(Respondent) Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable
Geo. A. Carpenter,
District Judge.

Petition for Rehearing.

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FILED

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Petition for Rehearing.

A rehearing in this case should be allowed. Appellant respectfully petitions this court for a rehearing because it submits that the following points have been overlooked and misapprehended by the court:

I.

We respectfully submit that the court has erred in holding that appellant was not the "owner" of the boat.

This error, we submit, is due to the fact that the court has overlooked the well established legal proposition that where a conditional sale contract is entered into, the vendee acquires no ownership in the goods and that the delivery of possession takes effect only according to the agreement of the parties and can operate to vest the title in the vendee only when the contingency contemplated by the contract arises.

This fundamental proposition is settled beyond all question by the decisions of the United States Supreme Court. In our principal brief (Appellant's Brief pp. 19-20) we cited, among other cases, *Bierce* v. *Hutchins*, 205 U. S. 340, which squarely holds the proposition asserted. As pointed out in that case, the fact that possession was to be and was delivered to the vendee did not make the property belong to the vendee, nor even did the requirement of additional security in the form of first mortgage bonds. The Supreme Court in that case aptly said:

> "* * * when a purchaser has possession and the right to gain the title by payment, he cannot complain of a bargain by which he binds himself to pay and is not to get the title until he does."

If the contract between appellant and appellee was a conditional sale, then the ownership of the cruiser did not pass to the appellee, if the decisions of the Supreme Court are to be followed, and we respectfully submit there is no alternative.

While this court in its opinion refers to the agreement as a "conditional agreement for the sale by appellant to appellee of the boat" (opinion p. 1), it says "The relationship between the parties was merely that of buyer and seller" (opinion p. 5).

The decisions, cited in our principal brief to the proposition that under a conditional sale contract the ownership of the goods does not pass to the vendee, are

not referred to in the opinion. We do not for that reason claim they were overlooked. The effect, however, of those holdings, we submit, has been overlooked for the reason that the *ratio decidendi* is that the seller in the case at bar reserved "bare legal title" *only* and that this *limited* reservation was insufficient to make the seller an "owner of any vessel" within the meaning of the statute.

On page 2 of the printed opinion this court stated:

> "By the terms of the agreement the bare legal title to the boat was retained by appellant until the purchase price of $14,039.03 was paid."

Again on page 5 this court stated:

> "Appellant merely retained the bare legal title of the boat as security for the unpaid portion of the purchase price."

Finally this court stated on page 6:

> "Under such circumstances, to permit appellant to limit its liability on the ground that it holds a bare legal title by reason of a conditional sale, which appellant must be considered as admitting is a mere security for the unpaid purchase price, we think is going further than the statute warrants."

The *implication* in the use of the words "bare legal title" is that the contract, though referred to as a "conditional agreement for the sale", was not in fact a true conditional sale, and that notwithstanding the name given it, the ownership of the vessel in fact passed to the vendee.

Under the law the contract is either a contract of conditional sale or it is a sale with a mortgage back as security for the purchase price. It must be one or the other. It cannot be both. Under the decision of the United States Supreme Court, *Bierce* v. *Hutchins*, 205

U. S. 340, (Appellant's Original Brief, p. 19) the contract must, we submit, be held to be a conditional sale and not a sale with a mortgage back. If it is a conditional sale, the ownership of the boat did not pass thereby to the vendee but remained in the vendor.

R. S. Sec. 4283 provides that the liability of the "owner" of any vessel may be limited.

If the contract in question was a conditional sale contract, then there is no escape from the proposition that the ownership of the vessel did not pass to the vendee and that the American Car and Foundry Company was the "owner" of the vessel.

Aside from the importance of the decision of this court to the parties involved, this decision will be of tremendous importance in admiralty law generally upon the proposition as to whether a conditional vendor is an "owner", and whether the well established rule at common law that a conditional vendor is an "owner" is not the rule in admiralty, but that instead the rule in admiralty is that a conditional sale must be construed as a mortgage.

The conditional sale is set forth in the libel. Its construction is a matter of law. If it is a conditional sale contract and the court is of the opinion that notwithstanding it is a conditional sale, nevertheless, appellant was not the owner of the boat, we submit that the court should clarify its decision by directly holding that the law of conditional sales does not apply in admiralty insofar as reserving ownership of the property to the vendor is concerned. Upon a reconsideration of the question, we do not believe this court intended to so hold.

To assist the court in construing the instrument, we refer to the following material provisions of the condi-

tional sale agreement which we think must have been overlooked. The agreement was not a bill of sale.

Paragraph I of the Agreement begins:

> "The Seller agrees to sell and the Purchaser agrees to buy* * *."

The seller still remained the owner of the boat. The ownership of the boat did not pass to the buyer upon the execution of the instrument. It did not pass upon the delivery of the boat and prior to the time of the accident.

The agreement provided in paragraph 3:

> "The delivery to and acceptance of the boat by Purchaser shall not vest in Purchaser any title thereto or right therein."

And further:

> "* * * the title to and *ownership* (italics ours) of the boat shall not pass to or vest in Purchaser but shall remain and be in Seller."

After delivery of the boat and at the time of the accident, the purchaser had no insurable interest in the boat for the entire amount of the purchase price. He was not the owner of the boat and, therefore, could not insure it for the entire purchase price. Paragraph 4 of the agreement so recognized the ownership in the seller and provided that possession of the insurance policies with full marine coverage, ordered by the buyer, be placed in the possession of the seller, with loss, if any, payable to the seller, as its interest may appear. See *The Eddie*, 8 Fed. (2d) 63 (S. D. N. Y.), where the seller of barges with title reserved by a conditional sale was held entitled to the proceeds of the insurance policy covering damages to the barges.

Paragraph 6 of the agreement restricted the assignment of the purchaser's rights under the contract, and also provided:

> "Purchaser shall not part with the possession or allow the boat to pass out of Purchaser's possession or control, except in the usual and ordinary operation of the boat."

Paragraph 7 provided that when payment in full was made by the purchaser and when the purchaser performed all of the obligations under the agreement, and also when the purchaser paid the seller the additional sum of $1.00, the seller agreed to execute and deliver to the purchaser a bill of sale

> "as evidence of the Purchaser's title to the boat and of Purchaser's compliance with the terms of this contract and as evidence that the *absolute ownership* (italics ours) of the boat is vested in Purchaser."

Paragraph 8 of the agreement further limited the *possession and use* of the boat by the purchaser and set forth the conditions under which the seller might *repossess* the boat after delivery and before payment of the purchase price was due.

These facts are fully set forth in appellant's brief, page 18, and in its reply brief, pages 2, 3, 4. Furthermore, the allegation that American Car and Foundry Company was the owner of the boat at the time of the accident was set forth clearly and frequently in the libel (Article I, IV, V, VIII, XI, XIII, XIV and XV).

The agreement not only *expressly* reserved *ownership* in the seller but also reserved many *incidents of ownership,* including control of the *use, occupation* and *operation* of the boat by the buyer. The agreement restricted the transfer by the buyer and his *dominion* and *control* over the boat until the entire amount of the purchase

price was paid. The seller was given the right to take possession of the boat after delivery and before payment of the purchase price, under certain conditions. The ownership of the boat had not passed from the seller to the buyer. A sale had not been consummated. Therefore, the statement that the conditional sale agreement reserved *merely* "bare legal title" in the seller is not in accordance with the facts. The decision of this court is based in large part upon that assumption, namely, that the legal effect of the conditional sale agreement was merely a reservation of "bare legal title" in the seller. We respectfully petition this court that such an assumption is erroneous. The facts should be re-examined and a rehearing should be granted.

The opinion of this court on page 5 states as follows:

> "Appellant merely retained the bare legal title of the boat as security for the unpaid portion of the purchase price. Indeed, the sixth paragraph of the sales agreement characterizes the contract as security for the unpaid note, and we think it must be so considered."

Does the court mean to hold that the contract was an absolute sale with a mortgage back and not a conditional sale at all?

We respectfully submit that the sixth paragraph does not change the character of the contract from that of a conditional sale into an absolute sale with a mortgage back.

The question whether a contract shows a conditional sale or an absolute sale with a mortgage back turns upon the ruling intention of the parties as disclosed by the entire contract, and not upon any single provision separately considered. Furthermore, there is nothing in the sixth paragraph inconsistent with the retention of ownership in the vendor pending payment of the notes.

Bierce v. *Hutchins*, 205 U. S. 340, 348; *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, 272, 273. If it could be said that if the appellant had exercised the option to sell the notes and in the event of a transfer of the notes, and a default thereafter by the appellee in payment, to acquire and pay same, the exercise thereof would have been inconsistent with a retention of ownership (which would not, however, follow in view of the language of the contract) it is sufficient answer that the option was not exercised. As said in *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, in speaking of the effect of certain privileges given by the contract in that case, which if exercised would have been inconsistent with continued assertion of ownership in the vendor,

p. 273—

> "But the privilege was not exercised, and it hardly can be said that its mere reservation nullified the express words of the stipulation concerning the title. That it was not intended to do so seems manifest when the entire contract is considered."

Nor does the case of *Morgan's Assignees* v. *Shinn*, 82 U. S. 105, cited by this court (Opinion page 5) sustain the proposition that the contract in the case at bar is not a conditional sale. In that case Kelly being a one-fourth owner of a vessel made a bill of sale of his one-fourth interest to Shinn. It was asserted in the answer that the bill of sale was in fact a mortgage given to secure Shinn for a sum of money agreed to be lent by him to Kelly. The court said, p. 109,

> "We think the averment of the answer that the bill of sale was intended by the parties to be only a security, is sufficiently proved. The testimony of Shinn himself is positive. It is confirmed by that of the scrivener, and the testimony of both is entirely uncontradicted."

The above statement of that case is sufficient to show it has no application to the case at bar. The allegations of the libel and the conditional sale set forth in the libel in the case at bar cannot possibly be held to show that the contract was executed to secure appellant for money loaned to appellee.

To minimize the restricted use and occupation of the boat granted to the buyer until the entire purchase price was paid and to conclude that the seller was not the owner of the boat at the time of the accident (contrary to the *expressed* intention of the parties) is to destroy the conditional sale agreement. In a *practical* sense and in a *legal* sense the appellant was the owner of the boat at the time of the accident.

The court is misled, we think, by cases cited (opinion p. 5) to the effect that the vendor of a vessel under a conditional sale agreement is not liable for repairs or supplies furnished to the vessel, etc. Those cases, we submit, have no bearing upon the question here as to whether or not the conditional vendor is the "owner." The basis of liability or non-liability for repairs or supplies furnished to the vessel when the owner is not in possession *depends solely upon the question of agency and nothing else.* In those cases the question is whether or not the person in possession was the agent of the alleged owner and authorized to bind him by contract. And in that respect, there is no difference between cases of conditional sale and mortgages. *The same rule, to-wit, the rule of agency, applies in either case.*

Thus, in *The Boise Penrose,* 22 Fed. (2d) 919 (C. C. A. 2d), where the seller of a tug reserving title was held not liable for repairs, Judge Hand, delivering the opinion, said (p. 919):

> "The theory of the libelant is that the Barton Company, as vendee in possession, was agent of the

appellant, as vendor, to contract for the repairs. The question is of common-law liability, not of maritime law, and the situation is indistinguishable from that of supplies furnished, or repairs done, at the order of a mortgagor in possession."

(p. 920):

"To-day, so far as we can find, it is universally held that neither a mortgagee, nor a vendor reserving title, is as such liable for supplies or repairs. There must be some conduct other than the registry of title in his own name which estops him to deny that the mortgagor or vendee is his agent, or some proof of actual authority."

(Compare also the case of *The H. C. Grady,* 87 Fed. 232.)

The question before the court in the case at bar is not whether appellant is liable for some act of appellee, as agent of appellant, but whether or not appellant is the "*owner*" of the boat—whether or not the ownership of the boat passed to appellee by virtue of the conditional sale. That question, we submit, must be answered under the uniform holdings of the courts with respect to conditional sales, in accordance with the contention of appellant.

Even on this court's theory of bare legal title in appellant, would it not follow appellant was a part owner within Section 189 of U. S. Code Title 46; see *Flink* v. *Paladini,* 279 U. S. 59, 62.

The opinion of this court, page 6, states as follows:

"Appellant also relies on *The Milwaukee*, 48 F. (2d) 842, but in that case the agreement to sell was executory, and the performance was awaiting the doing of a future act."

The agreement to sell in the case at bar also "was executory, and the performance was awaiting the doing

of a future act," namely, the payment of money to the seller and the transfer of *all of the property* in the boat by the seller to the buyer. This court, we submit, apparently is of the opinion (notwithstanding the fact that the agreement clearly expresses the intention of the parties to be otherwise) that the conditional sale agreement in the case at bar was an agreement of sale, that the transaction was executed or that all of the property in the boat, except "bare legal title," had passed to the buyer. We have heretofore pointed out the errors of such conclusions. To correct these errors rehearing should be granted.

The intention of the parties as expressed in the agreement controlled the decision of the court in *The Milwaukee*. We quote from page 844 of that opinion:

> "In my judgment, it becomes quite immaterial whether, upon certain phases of the agreement or the plan, it was necessary to invoke the jurisdiction of the Commission. The proof shows that the parties regarded the plan as executory and as continuing to be executory until the Commission had determined the matters submitted to it. The question is not whether a title, speaking in strictness, remained in abeyance, but whether, notwithstanding words of present purchase and sale, the parties considered the whole arrangement as executory and as necessarily awaiting the doing of some future act upon which, it may well be said, it was all conditional.
>
> "I am satisfied that the petitioner is entitled to the benefit of the limitation act; and a decree may be entered accordingly."

One of the questions in issue in the case of *The Milwaukee* was whether the Grand Trunk Ferry Company was the owner of the ferry at the time of the accident. The agreement for sale of the ferry company to the Grand Trunk Railroad Company was made November 15, 1928, subject to the approval by the Interstate Com-

merce Commission. It was approved by the Interstate Commerce Commission November 8, 1929, some two weeks after the loss in question. The court held that the memorandum of sale dated November 15, 1928 (*The Milwaukee*, 48 F. (2d) 842, 844):

> "was a part of a plan which for more than a year remained conditional or executory, as between the two parties."

In like manner, the agreement in the case at bar was "conditional or executory, as between the two parties." The court in *The Milwaukee* nevertheless permitted Grand Trunk Ferry Company, as *owner*, to limit its liability for the loss in question. The case of *The Milwaukee* is not distinguishable in principle from the case at bar.

In the opinion of this court, page 6, it is said "to permit appellant to limit its liability on the ground that it holds a bare legal title by reason of a conditional sale, which appellant must be considered as admitting is a mere security for the unpaid purchase price, we think is going further than the statute warrants". We do not understand what the court means by the words "which appellant must be considered as *admitting* is a mere security for the unpaid purchase price". The libel does not admit it, nor is any such admission contained in any brief filed by appellant nor was any such admission made by proctors for appellant upon the oral argument before this court. We think possibly the court refers to the construction which the court puts upon the sixth paragraph of the contract, which we have heretofore discussed. As it is not clear, however, just what the court is referring to, we call the court's attention to it and assert that appellant has never admitted the contract was mere security for the unpaid purchase price. On the contrary, it was, and still is,

appellant's contention that ownership of the boat remained in appellant until the conditions of the contract, payment of the entire purchase price among other conditions, were performed.

We submit that under the uniform holdings of the courts the contract must be construed to be a conditional sale and not a mortgage.

With this conception of the relation of the parties—i. e. appellant as owner of the boat and appellee in possession with a right to obtain ownership only upon the ripening of the conditions mentioned in the contract—the difficulty in determining the right of appellant to limit liability disappears.

II.

The determination of the question whether or not the American Car and Foundry Company was the owner of the boat at the time of the accident is one legal conclusion. It is determined by a *construction of the written agreement.* The determination of the question whether or not the American Car and Foundry Company, as owner of the boat, may limit its liability under the statute is another legal conclusion. It is determined by a *construction of the statute.* This court, we submit, has confused the two questions.

On page 3 of the opinion, this court stated:

> "In determining whether appellant was the owner of the boat at the time of the accident it is quite necessary to refer to the conditions as they existed at the time of the enactment, as well as to subsequent decisions, in order to gather, if possible, the reasons which prompted the legislation and guided the courts' interpretation of it."

This method of "determining whether appellant was the *owner* of the boat at the time of the accident" is logically and legally untenable. However, in *construing the statute,* consideration of the reasons prompting the enactment of the legislation may aid in determining whether or not the appellant, *as owner,* comes within the provisions of the statute and may limit its liability.

This court stated (opinion, page 4):

> "Obviously, therefore, the purpose of the statute is to promote shipping or maritime commerce by limiting the liability, under certain conditions, of the owners of vessels who engage in it."

Is "shipping or maritime commerce" promoted when the manufacturer and owner of a vessel is thus subjected to an unlimited liability?

Is the only purpose of the statute "to promote shipping or maritime commerce"? The last quotation in this petition from the opinion of this court and the judgment of the court itself suggest an affirmative answer. However, the Supreme Court of the United States in the *Chero Cola* case, 271 U. S. 19, cited with approval by this court in its opinion on page 4, states in part as follows:

> "*Our statutes establishing the rule were enacted to promote the building of ships* * * *. (Italics ours.) The rule should be applied having regard to the purposes it is intended to subserve and the reasons on which it rests."

The statute in question was enacted for the purpose of promoting the "building of ships". The libel alleges that appellant is engaged in the manufacture of cruisers and the sale thereof by conditional sale, retaining ownership until the total amount of the purchase price has been paid. (R. 2) By virtue of the conditional sale contract, appellant remained the owner of the cruiser.

The additional fact that appellant was engaged in the business of manufacturing cruisers instead of eliminating appellant from the protection of the limitation statute, on the contrary shows that appellant falls directly within the purpose of the statute, to-wit, "to promote the building of ships".

We assert that the one condition, to-wit, that the one claiming the right to limit liability is the "owner", is all that is necessary to enable him to limit a liability in tort for damage caused by the vessel, regardless of whether he be engaged in shipping or in the building of ships. If however the business in which he is engaged is to be considered in determining his right to limit liability, the business of manufacturing the cruisers is of necessity promoted by a holding that appellant is within the statute, and the purpose of the statute is thereby subserved.

It is apparent from the libel that thousands of dollars were risked in the building of the particular cruiser. It is fair to assume that appellant has a substantial investment in such enterprise. If the building of such ships is to be promoted (and there is no question but that the boat in question is a vessel within the meaning of the statute) it can only be done by holding that the business of appellant falls within the purpose of the statute.

The quotation from the opinion of this court limiting the purpose of the statute "to promote shipping or maritime commerce" should be revised and considered with the quotation from the Supreme Court of the United States in the *Chero Cola* case, cited in the opinion of this court, to the effect that one of the purposes of the statute, *among others*, was "to promote the building of ships."

Furthermore, "the courts have uniformly held that a private vessel or yacht is within the limitation section", *notwithstanding the fact that it might not at the time of the accident or at any time be engaged in "shipping or maritime commerce."* (See appellant's brief, pages 23 and 24, and cases there cited.)

The resume of the cases on this question is contained in *The Muriel*, 25 Fed. (2d) 505, (appellant's brief, page 24). The judgment of this court is contrary to all of the cases there reviewed. We refer also *Lehigh Valley R. Co.* v. *Jones*, 50 Fed. (2d) 828 (C. C. A. 3rd Cir.), appellant's brief, page 22, at page 830:

> "We are concerned only with sec. 183 of the act which nowhere restricts the right of an owner to limit his liability to losses arising on a voyage but which generally in given circumstances, accords him the right to limit his liability for losses purely maritime."

We again refer to the opinion of this court, page 4, as follows:

> "Obviously, therefore, the purpose of the statute is to promote shipping or maritime commerce by limiting the liability, under certain conditions, of the owners of vessels who engage in it."

The requirement that owners of the vessel be engaged in "shipping or maritime commerce" at the time of the accident in order to be permitted to avail themselves of the limitation statute is not warranted by the adjudicated cases. All of the cases cited in this petition and taken from appellant's brief are contrary to such a proposition of law. Therefore, a rehearing should be granted to correct the error.

III.

The opinion of this court, pages 4-5, states as follows:

> "The liability which the statute limits is an imputed one, and the imputation is raised because of his ownership and the relationship which exists between himself and those in charge of the vessel."

The statute is not subject to the interpretation which the Court has put upon it. The statute does not say that the liability which may be limited is a liability based upon ownership. Under the statute any liability of the owner of any vessel for any loss, damage, etc., may be limited, *unless* the loss or damage occurred with the privity or knowledge of the owner. The only exception to the right of the owner to limit liability is that contained in the statute, provided, of course, the damage claimed is a tort for which the owner *could be* [though he need not be] sued in admiralty.

Under the exception stated in the statute, the owner, when any damage is caused by an alleged defect in the vessel which he owns, regardless of the manner in which the person damaged may ground his claim, or where he may elect to assert his claim, may limit his liability, if any, for the damage so caused, *unless* the damage was done, occasioned or incurred with "the privity or knowledge of such owner."

And (as pointed out in appellant's reply brief, pages 14, 15 and 16), when the owner is a corporation the privity or knowledge must be that of the managing officers of the corporation. Thus, if defects in a boiler are of such a character as can not be detected by an unskilled person, in other words, are not patent, and if the managing officers of a corporation have no actual knowl-

edge of the alleged defects, and if they have employed, in good faith, competent persons to inspect or pass upon the safety of the boiler and such persons so employed, although finding defects, have not reported them to the managing officers, in such case privity or knowledge cannot be imputed and liability may be limited. To that extent it may be said that the liability which the statute limits is an imputed one—in other words, when privity or knowledge must be imputed, the liability may be limited.

The imputation is not, as stated by this court in its opinion, raised because of ownership and the relation which exists between the owner and those in charge of the vessel. In the case of a defective boiler, or as in the case at bar, an alleged defect in the boat resulting in an explosion and damage, the imputation would arise if, in the case of a corporation, the privity or knowledge could not be shown to be that of the managing officers of the corporation but had to be imputed to them because of the knowledge of a subordinate. Where the corporation was in possession and control of the boat through its agents and servants, the imputation might arise from that relationship, since the only knowledge that could be imputed might appear to be only the knowledge of those in actual charge of the vessel. But the imputation is not confined exclusively to that relationship. The vessel might be in the charge and control of an independent contractor or, as in the case at bar, in charge of the conditional vendee. In either case it would be necessary to show that the owner had knowledge through its managing officers of the defect which resulted in the damage. If that knowledge depended solely upon the knowledge of subordinates acquired in building the boat or inspecting it before delivery, in other words, if it had to be imputed, the liability could be limited.

The libel alleges the loss and damage occurred without the privity or knowledge of appellant, and thus as against the exceptions, which operate as a demurrer, it states a case which *prima facie* entitles appellant to limit liability. If, after answer filed and evidence taken, it appears that the loss and damage were occasioned or incurred with the privity or knowledge of the managing officers of appellant, within the meaning of those words as defined by the authorities and is not simply imputed to appellant by reason of the knowledge, if any, of subordinates of defects, if any, in the boat causing the explosion thereon, then the liability for such damage can not be limited. But the case now before the court is not that but solely whether the libel is sufficient to require answer by the appellee.

IV.

The opinion of this court, page 6, states as follows:

> "It has been repeatedly held that the manufacture of boats is not a maritime enterprise."

The libel does not allege that appellee received personal injuries at a time when he was engaged in "the manufacture of boats" or when the appellant was engaged "in the manufacture of boats." The statement of the court correctly recites a principle of law, but the principle has no material relation to the issues in the case at bar. (See Appellant's Reply Brief, pp. 8 *et seq.*)

The opinion of this court, page 6, continues as follows:

> "It must be borne in mind that appellee's cause of action is not based on appellant's ownership. Appellant is not sued as an owner but as a manufacturer or builder, and the gist of the action is appellant's direct negligence in construction, equip-

> ment, and inspection, a failure of a duty which, so far as liability is concerned, is in no way connected with maritime enterprises or with appellant's ownership."

The record does not show the basis of appellee's cause of action on the common law side of the court. Reference to the common law action was first made in the brief of the appellee. Appellant's reply brief, pages 1, 2 and 18, called the attention of this court to the fact that appellee had gone outside the record, and also that if appellee wished to avail himself of any such facts they should be set up by way of answer. At the time of oral argument these matters again were called to the attention of this court.

We do not deny a suit at common law has been brought. Our position is that it is immaterial whether it has been brought or not or upon what theory it is brought. The right *prima facie* of appellant to limit liability must be determined from the libel. If the claim of appellee is based upon facts not alleged in the libel, it must be shown by answer, and for that reason we asserted in our reply brief and reassert that if the exact nature of the claim made in the common law suit is in any way material, the claim must be brought into the record by appellee by way of answer. Thus this court does not know whether in the common law suit appellee sets up the conditional sale contract or not. If required to answer the libel, appellee will be required to admit or deny the conditional sale contract set up in the libel.

The issue, and the only issue, before this court is well stated in the opinion, page 2:

> "The question presented by this appeal is whether the libel states sufficient facts to entitle appellant to limit its liability, if there be any liability."

The libel does not allege that a claim is being made against appellant because it is the owner of the boat, but alleges that it is the "owner", that the damage is claimed to have resulted to appellee's person and personal property by reason of an explosion occurring *on said boat* while it was being operated by appellee on the waters of Lake Michigan, and that hence under the statute appellant, being the owner of the boat, is entitled to limit its liability, if any, for the damage caused by the explosion.

Assuming that the claim of appellee will be based upon the theory of negligence in construction of the boat,

> "the negligence, of itself, furnishes no cause of action; it is *damnum absque injuria*, The damage is the substance and consummation of the injury, and from that alone springs the right of recovery",

(See Appellant's Reply Brief, pp. 9-10).

Hence, as we there pointed out, the claim for the damages suffered by appellee is a claim which could be asserted against appellant in admiralty. From which it necessarily follows that since appellant was the owner of the boat it is entitled to claim the benefit of the limitation statute *unless* appellee can show that the damage was occasioned or incurred with the privity or knowledge of appellant.

The mere fact that liability on another theory of law may be asserted at common law against appellant does not preclude appellant from availing itself of the limitation statute in admiralty. *Appellee by asserting a particular theory of liability in an action at law cannot repeal the limitation statute.*

The statement in the opinion that the theory of appellee's asserted liability (at common law) "is in no way connected with maritime enterprises or with appellant's ownership" does not change the *maritime* na-

ture of the *liability* or the *manner* of its limitation in admiralty. (See rules of practice for the courts of the United States in admiralty and maritime jurisdiction, rule 51.) Appellant need not be connected with "maritime enterprises" at the time of the accident in order to benefit from the limitation statute, as heretofore pointed out in the petition. (See also *The Muriel,* 25 Fed. (2d) 505, where the owner of the vessel was not in charge of the voyage at the time of the accident, and cases cited in appellant's brief, pages 22-23-24).

The alleged loss and injury to appellee occurred on navigable waters of the United States. The place where the loss and injury occurred of *necessity* makes the asserted liability a *maritime* liability. (See appellee's reply brief and cases cited, pages 9-10-11.) Thus, even in the common law action, the measure of liability, if any, will be in accordance with the rules of *admiralty* and not in accordance with those of the common law. This is so because the Constitution of the United States, Article III, Section II, provides for the uniformity of the Admiralty Law. (See *Grant Smith-Porter Co.* v. *Rohde,* 257 U. S. 469, 476, 477 and cases cited therein, *Chelentis* v. *Luckenback S. S. Co.,* 247 U. S. 372, *So. Pac. Co.* v. *Jensen,* 244 U. S. 205; appellant's reply brief, page 9.)

> "It was a maritime tort. The rights and obligations of the parties depended on and arose out of the maritime law. A proceeding to impose liability for such a tort is a cause in admiralty within the meaning of article 3, § 2 of the Constitution, triable in the United States courts sitting in admiralty." (*Spencer Kellog & Sons* v. *Hicks et al.,* 52 S. C. 450, 453.)

Therefore, we respectfully submit, that the language herein quoted from page 6 of the opinion of this court has no material relation to the issues presented in the

case at bar and has resulted in an erroneous judgment. Rehearing should be granted to correct these errors.

The opinion of the court, on page 6, further states:

> "We are further of the opinion that the statute purports to limit only that liability which arises from or grows out of ownership. In the instant case there is no such liability claimed, and until such liability is apparent there can be no limitation."

The limitation statute does not limit only that liability "which arises from or grows out of ownership." The statute limits "*the liability of the owner of any vessel*", that is, *any* liability.

If the interpretation of this court is correct, then the statute could easily be defeated in every case by claiming in a common law action any liability other than one "which arises from or grows out of ownership." In other words, all that appellee must do to defeat the operation of the statute, and thereby the intention of Congress, is to claim at common law some sort of liability other than one "which arises from or grows out of ownership" and, *ipso facto,* the limitation statute is made impotent. Rehearing should be granted to correct the error.

V.

We are convinced that rehearing should be granted for the reasons heretofore stated. However, if this court should decide otherwise, we respectfully call the attention of the court to the recent case of *Ex Parte Winfield A. Green,* 52 S. Ct. 602, decided May 23, 1932, wherein the Supreme Court held that when the issues of "privity or knowledge" and "the right to limit liability" are presented to any court, the admiralty court has "exclu-

sive jurisdiction" to decide all of the issues presented in such a controversy. The "question of the owner's right to limited liability having been raised, the cause became cognizable only in admiralty."

Therefore, in view of that case the trial court erred in dismissing the libel and should have proceeded to take evidence and decide the liability, if any, of this appellant *even though the trial court may have been of the opinion that there was no right to have liability limited.* See also *Hartford Accident and Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 220; *Spencer Kellogg and Sons* v. *Hicks, et al.*, 52 S. Ct. 450, 453; *Admiralty Rule 53* (254 U. S. Appendix); *The 84-H*, 296 Fed. 427, 431. Complete relief was prayed for by appellant in the libel in article XIV.

Therefore, this court in trying the issues *de novo* (*Irbine* v. *The Hesper*, 122 U. S. 256, 266; *Reid* v. *American Express Co.*, 241 U. S. 544, 548; *Standard Oil Co.* v. *Southern Pacific Co.*, 268 U. S. 146, 155; *Langnes* v. *Green*, 282 U. S. 531; *Munson S. S. Line* v. *Miramar S. S. Co.*, 167 Fed. 960) still has an opportunity to correct the errors to avoid needless litigation and circuity of action and to do justice between the parties.

CONCLUSION.

In conclusion may we say that in deference to the recognized ability of the Judges of this court we have a certain hesitancy in stating that the court has erred in its opinion and judgment.

At the same time not only is it our duty to our client but, as officers of this court, to this court as well, if we, in good faith, believe the court has erred to say so.

We are thoroughly convinced the court has erred. For that reason we have endeavored to point out, as briefly as the nature and importance of the questions involved will permit, the errors which we conscientiously believe exist, and it is our honest and sincere belief that a re hearing in this cause should be granted.

Respectfully submitted

CHARLES J. HARDY,
NOAH A. STANCLIFFE,
JOHN R. COCHRAN,
LEONARD F. MARTIN,
PAUL R. CONAGHAN,
Proctors for (Libellant) Appellant.

And on the same day, to-wit: On the fourteenth day of July, 1932, there was filed in the office of the Clerk of this Court a Proof of Service, which said Proof of Service is in the words and figures following, to -wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4710. October Term, A. D. 1931.

American Car and Foundry Company, a Corporation, (*Libellant*) *Appellant*, *vs.* H. A. Brassert, (*Respondent*) *Appellee*.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable Geo. A. Carpenter, District Judge.

PROOF OF SERVICE.

Please take notice that on Thursday, July 14, 1932, we will file with the Clerk of the United States Circuit Court of Appeals, for the Seventh Circuit, twenty (20) copies of the petition for rehearing of American Car and Foundry Company, a corporation, appellant, in the foregoing entitled case, three (3) copies of which are presented herewith.

CHARLES J. HARDY,
NOAH A. STANCLIFFE,
JOHN R. COCHRAN,
Proctors for Appellant.

Received three (3) copies of this petition for rehearing this 14th day of July, 1932.

ROY O. WEST,
PERCY B. ECKHART,
LEWIS C. JESSEPH,
Proctors for Appellee.

Endorsed: Filed July 14, 1932. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-second day of July, 1932, there was filed in the office of the Clerk of this Court, an Answer to the Petition for a Rehearing, which said Answer to the Petition for a Rehearing is in the words and figures following, to wit: